

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1442

To be argued by
T. BARRY KINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1442

UNITED STATES OF AMERICA,

—v.—

WILLIAM E. HASENSTAB,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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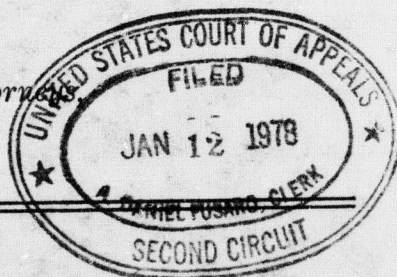


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1442

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM E. HASENSTAB,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Hasenstab appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on October 6, 1977, following a five-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 77 Cr. 509, filed on July 5, 1977, charged the defendant Hasenstab in three counts with mail fraud, wire fraud and conspiracy, in violation, respectively, of Title 18, United States Code, Sections 1341, 1343 and 371.

Trial commenced on August 22, 1977 and ended on August 26, 1977, when the jury returned a verdict of guilty on all counts. On October 6, 1977 the District Court imposed a sentence of six months imprisonment on Count One, two years probation on Count Two, and a fine of \$7500 on Count Three.

Hasenstab has paid his fine and remains free on his own recognizance pending the outcome of this appeal.

Statement of Facts

The Government's Case

The Government's proof at trial demonstrated that from 1968 through 1976 William Hasenstab, a purchasing supervisor for Pan American World Airways, Inc., ("Pan American"), received more than \$50,000 in secret cash kickbacks from his co-conspirator George Barney.* Barney, who was president of Tabulating Stock Forms, Inc., a company which supplied Pan American with printed business forms, paid Hasenstab the lucrative cash kickbacks in return for Hasenstab's considerable efforts to see that Tabulating received favored treatment from Pan American. The kickback scheme, which of course deprived Pan American of the honest and faithful services of its employee Hasenstab, was furthered by Barney's submission of bills and his receipt of payment through the mail from Pan American, and through periodic telephone calls by Barney between New York and Pan American's computer center at Rockleigh, New Jersey.

George Barney first met Hasenstab in 1967, when the defendant was a buyer of business forms at Pan American. (Tr. 319).** During the next three years Barney sold forms to Pan American through Hasenstab

* Barney was not charged in this indictment. He pleaded guilty to wire fraud and conspiracy in connection with his payment of commercial bribes to an official of Drexel-Burnham, a brokerage house. (Tr. 362). He is presently awaiting sentence by Judge Owen.

** "Tr." refers to the trial transcript. "GX" and "DX" refer to Government and defense exhibits, respectively.

and in appreciation for the business he received, Barney paid Hasenstab approximately fifty to one hundred dollars, once or twice each month. (Tr. 323-24). After a labor strike against his company in 1970, Barney was unable to take new orders from Pan American. (Tr. 328). However, when Barney resumed active business with Pan American in 1972, Hasenstab told Barney that he liked their payoff arrangement, expected it to continue, but would be satisfied to receive only what Barney thought Hasenstab's services were worth. (Tr. 329). Barney, in response, told Hasenstab he would pay him 5% of the total dollar sales by Tabulating Forms to Pan American. (Tr. 330).

Between 1973 and 1976 Pan American's purchases from Barney rose from \$68,648 to \$498,659. (Tr. 448). In return for this substantial business Barney estimated that he paid Hasenstab a total of about \$50,000 in cash, with payments made on a monthly basis. The kickbacks were delivered by Barney to Hasenstab at various sites: the Pan Am Building in Manhattan, Hasenstab's office at JFK Airport, and the Hamilton House restaurant in Brooklyn. (Tr. 333). Following Barney's arrest by the FBI in late 1976, two of Hasenstab's meetings with Barney were recorded with Barney's consent. (Tr. 364-70).^{*} At the first of the recorded meetings, on December 1, 1976, Barney paid Hasenstab \$1,000 in cash at the Hamilton House in Brooklyn. Because \$3,000 was due on the schedule of payments for that month, Hasenstab expressed dismay, but recognized, "Still, it's the first time you're short." At the second recorded meeting on January 6, 1977, Barney said he could not pay because he had not received payment from Pan American on certain orders. Hasenstab, in turn, complained, "It

^{*} Tape recordings of the meetings were introduced in evidence (GX 10, 11) and played for the jury.

hurts, not seeing it coming in." . . . "You're getting me used to a life style."

In return for the secret kickbacks, Hasenstab also helped Barney by fixing price levels and rigging bids. (Tr. 332). This practice was in contrast to the normal legitimate purchasing system for business forms at Pan American by which vendors were selected based upon competitive bidding. Usually, Walter O'Toole, the Purchasing Unit Manager, would furnish Pan American's requisitions for business forms to Nicholas DiNapoli, a senior buyer. (Tr. 75). DiNapoli would distribute the requisitions among the buyers, including himself. The assigned buyer would obtain price quotations and select the supplier, usually the lowest of three bidders. The completed paperwork would then be sent for approval to Hasenstab, the Purchasing Unit Supervisor, and the order would be finalized. (Tr. 75-6, 287). Business with George Barney's company, however, was handled differently. DiNapoli testified that for about 60% of orders placed with Barney, Hasenstab himself informed DiNapoli what prices and "competitors" to enter on the bid quotation sheets, with Barney's price invariably appearing as the lowest. (Tr. 288-89). DiNapoli did not know whether Hasenstab actually obtained quotations, but he followed Hasenstab's orders, assuming that Hasenstab, an experienced printed forms specialist, knew what he was doing. (Tr. 303-4). Moreover, as a "management" employee Hasenstab was not permitted to fill out the bid sheets for orders. All such "productive work" had to be done by union employees like DiNapoli. (Tr. 291-92). Thus, Hasenstab was able to steer business to Barney, while at the same time make it appear as if DiNapoli himself had actually obtained the bid quotations.

In addition to routine orders, Pan American also had several long-term contracts with suppliers of printed forms. One of these was for the computer paper which

was used by Pan American's data processing facility at Rockleigh, New Jersey. (Tr. 94-6). For the supply of paper in the year 1975 this contract previously had been awarded to Moore Business Forms, one of the nation's largest suppliers. However, during 1975 Hasenstab agreed that Barney also could supply such paper, and a contract was entered into without any competitive bids. (Tr. 335-44). Shortly thereafter Barney's company was favored with the *entire* contract for the next year, 1976, worth about \$300,000, as an "extension" of the improperly obtained 1975 contract. All of these arrangements were made by Hasenstab at a time when he was receiving monthly cash payments from Barney of between \$1,000 and \$2,000.

As part of the scheme to defraud Pan American of his honest services, Hasenstab caused the company to use the mails to pay Barney, and Barney sent invoices, bills and confirmations of the rigged orders through the mail. In addition, Barney used the telephone between New York and Rockleigh, New Jersey to expedite his business with Pan American's computer center, and on occasion called Hasenstab in New York from Rockleigh in order to facilitate the placing of orders and payment of invoices. (Tr. 317-18, 348-51).

In an effort to help Barney disguise the kickbacks, Hasenstab at first suggested putting his own wife on Barney's payroll. He also gave Barney blank receipts from a restaurant near Hasenstab's office so that Barney could take false tax deductions for entertainment expenses for the money given to Hasenstab. (Tr. 349-53). To cover his own part in the scheme, Hasenstab filed false conflict of interest forms with Pan American, some by mail. (GX. 3-5; Tr. 107-108). On these forms Hasenstab falsely swore that he had not received any personal benefit above his salary for his work at Pan American, thus concealing from his employer the fact that he had received thousands of dollars from Barney on a regular basis.

The Defendant's Case

Hasenstab did not testify, but called as the only defense witness Sol Welger, the employee who prepared the requisitions for computer paper at Pan American's Rockleigh facility. Welger invoked his privilege against self-incrimination when asked on direct examination about his receipt of money or other gifts from George Barney,* but testified on cross-examination that Barney's company was awarded a portion of the 1975 computer paper contract without bids, and that Barney was given the entire contract for 1976. (Tr. 555-6). Welger also confirmed that Hasenstab was responsible for processing these orders of computer paper. Although the defense attempted to use Welger as a scapegoat by suggesting that he, not the defendant, was in league with Barney, Welger testified that at the time of the "negotiation" of the 1976 computer paper contract he was hospitalized in Florida and thus could not have been involved at all in this part of the scheme. (Tr. 558-9).

A R G U M E N T

POINT I

Proof of the mailings and phone calls was more than sufficient to sustain Hasenstab's convictions for mail fraud and wire fraud

Hasenstab's principal claim on appeal is that the evidence at trial failed to establish that use of the mails and interstate telephones was sufficiently connected to his scheme to defraud to justify conviction under the mail

* Barney testified that in addition to his payments to Hasenstab, he had given Welger three cars and the use of a credit card. (Tr. 356). Barney also paid commercial bribes to employees of other companies in order to obtain business (Tr. 356-360) and to one union official in connection with a strike settlement. (Tr. 360).

and wire fraud statutes.* Defendant's argument in this regard misperceives the significance of the mailings and phone calls undertaken here in furtherance of the scheme and misapplies settled case law to the facts of this case.

Through the testimony of Pan American employees and Hasenstab's co-conspirator, George Barney, the Government established that Barney used the interstate telephone to place and expedite his orders and that essentially all invoices, bills, correspondence and payments were sent by mail. The Government proved that virtually the entire business relationship between Pan American and Tabulating Forms, Inc.—Barney's company—was the product of the fraudulent activities of Hasenstab and Barney. Hasenstab was singularly responsible for improperly directing large amounts of business to Barney between 1972 and 1976, for which efforts he received by pre-arrangement approximately \$50,000 in secret kick-

* In a separate point, Hasenstab contends that if his conviction for either mail fraud or wire fraud is reversed, his conviction on conspiracy must also fall because mail fraud and wire fraud were separate objects of the conspiracy and the jury returned what he terms a "general verdict" of guilt. Thus, he argues, it is impossible to determine which object Hasenstab was convicted of conspiring to attain. Beside the fact that Hasenstab's convictions on mail and wire fraud were in all respects proper, the argument is to no avail in any event. This Court has held in a long line of cases, most recently in *United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976), that where multiple objects of a conspiracy are alleged in the indictment, proof of any one object will be sufficient to sustain the conviction. See *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 955 (1975); *United States v. Frank*, 520 F.2d 1287, 1193 (2d Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940). See also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Moreover, since the defendant here was convicted on both substantive counts, there is no room even for speculation that the jury was satisfied as to completion of both objects of the conspiracy. *United States v. Dixon*, *supra*.

backs. In this fashion Hasenstab defrauded Pan American of his honest and loyal services, as well as the benefit of lower prices which could have been obtained from Barney's competitors had honest bids been pursued.

In the face of this evidence, Hasenstab does not claim a failure to prove a scheme to defraud. Such schemes are well within the parameters of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. *United States v. Corey*, Dkt. No. 77-1308 (2d Cir. November 30, 1977), Slip. Op. at 586, n.2; *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975); *United States v. George*, 477 F.2d 239 (10th Cir. 1970). Instead, Hasenstab contends in effect that even though the mailings and phone calls caused by the defendant and his co-schemer were in furtherance of their scheme to defraud, no violation could have occurred because it was Pan American's normal business practice to pay and receive invoices by mail. Defendant's unfounded theory seeks to stand the mail and wire fraud statutes on their heads, and, if given recognition, incredibly would provide an absolute defense whenever participants in a scheme try to realize their illicit goals through the very means most likely to make their plan succeed.

The essence of Hasenstab's corrupt relationship with Barney was that Pan American would give business to Barney, for which Barney—and ultimately Hasenstab—would be paid. Hasenstab clearly knew that Barney was paid by mail and that invoices, bills, receipts and confirmations were sent and received in the mail. Thus, both the scheme to defraud Pan American and the mailings were established. In *Pereira v. United States*, 347 U.S. 1 (1954), the Court held that a specific contemplated use of the mails was not an essential element of a mail fraud prosecution. Rather, under the statute, a defendant "causes" the mails to be used in furtherance of the scheme when he acts "with knowledge that the use of the mails will follow in the ordinary course of

business, or where such use can reasonably be foreseen, even though not actually intended . . ." *Id.*, at 8-9. Here, of course, use of the mails in the ordinary course of Pan American's business was necessary to the successful accomplishment of the object of the scheme: business for Barney; kickbacks to Hasenstab. Moreover, to have attempted their scheme without the use of the mails would have removed all appearances of normalcy in Barney's relationship with Pan American, and thus would have thwarted, rather than advanced, the kickback plan.

United States v. Maze, 414 U.S. 395 (1974), upon which Hasenstab relies heavily, does not suggest a contrary result. In fact, analysis of *Maze* reveals why the mail fraud statute applies to Hasenstab's conduct. In *Maze*, the Court held that the defendant's scheme to defraud a bank by using a stolen credit card ended when he used the card to pay a motel bill. The mailing of receipts and payment to the motel by the bank was not in furtherance of the scheme because Maze already had completed his fraud. *Id.* at 402. There the mails were used as a *result* of the scheme and not in furtherance of it. Here, of course, the mails were an integral part of the scheme because that was the only way in which Barney could carry on his relationship with Pan American and obtain his money—and the orders to generate the money—which he paid to Hasenstab. The mailings here were not otherwise required by law, *Parr v. United States*, 363 U.S. 370 (1960), nor were they innocent mailings in the routine conduct of an otherwise ongoing legitimate business relationship, *United States v. Tarnopol*, 561 F.2d 466, 472-73 (3d Cir. 1977).^{*} The scheme here depended

^{*} The defendant's reliance on *Tarnopol* is misplaced. There the Court found that packing slips used in the ordinary course of a corporation's business were not mailings in furtherance of a scheme to defraud. The Court noted that the slips would have been mailed regardless of the fraud and that, indeed, the fraud-

[Footnote continued on following page]

upon the mailings for its fruition and for its continuation. As such, it depended upon "repeat business" between Barney and Pan American as well as the maintenance of all appearances of normality. This Court has recognized that mailings in such schemes are within the ambit of the mail fraud statute. *United States v. Cyphers*, 556 F.2d 630, 632-34 (2d Cir. 1977); *United States v. Marando*, 504 F.2d 126 (2d Cir.), *cert. denied*, 419 U.S. 1000 (1974).

Finally, in addition to the mailing of checks, bills, receipts and confirmations, the Government established that two of the false conflict of interest forms were forwarded through the mail by Hasenstab to Pan American. (G.X. 4-5). The use of the mail in these instances also served the intended purpose of concealing Hasenstab's receipt of bribes from Barney and thus was in furtherance of the scheme.

The evidence of use of interstate telephones also was more than sufficient to sustain Hasenstab's conviction on Count Two. Barney testified that he spoke by telephone from his office in New York City with Sol Welger at the Rockleigh, New Jersey computer facility several times a week and on one occasion called Hasenstab in New York from New Jersey. (Tr. 348-9). The purpose of each of these interstate phone calls was to regulate and control the paper contract between Tabulating and Pan American. The telephone thus was used in furtherance of the Hasenstab-Barney scheme because it was necessary for Barney

ulent scheme would better have been served by the absence of such slips. *Id.*, at 473. Here, of course, the mailings were not intrinsically legitimate because they were the product of the Barney-Hasenstab relationship and a necessary vehicle for the schemers' receipt of the money which was the ultimate object of their scheme.

to insure the continued receipt of requisitions from the New Jersey facility under the long-term computer paper contract which was "negotiated" by Hasenstab. The taped luncheon conversations between Hasenstab and Barney revealed that Hasenstab well knew this fact, and that Barney received payments based upon the amount of paper delivered pursuant to the fraudulently obtained contract. Accordingly, Barney's use of the telephone to facilitate that process resulted in his continued receipt of large payments from Pan American, of which Hasenstab received 5% in kickbacks, and thus was in furtherance of the schemers' illegal plan as proved at trial.

POINT II

The District Court's charge was entirely proper.

In a confused semantic discourse, Hasenstab criticizes several portions of Judge Ward's instructions to the jury, and claims errors which entitle him to a reversal of his conviction. A review of the District Court's complete and fair charge to the jury makes manifest that defendant's contentions, separately and collectively, are totally without merit.

A. Elements of the offenses.

Although Judge Ward properly and carefully instructed the jury at length on the requirement for conviction under the mail and wire fraud statutes that the mails or telephones be used *in furtherance of the scheme*, (Tr. 658-61), Hasenstab claims error in the trial judge's brief original summary reference. Hasenstab's suggestion that use of the word "involved" during the initial summary of elements somehow vitiated the balance of the Court's proper instructions, ignores the settled principle that the trial judge's instructions must be viewed as a whole.

United States v. Nemes, 555 F.2d 51 (2d Cir. 1977); *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Guilette*, 547 F.2d 743 (2d Cir. 1976).

The elements of the mail and wire fraud offenses are the existence of a scheme to defraud in which the defendant participated and the use of the mails or interstate wire facilities in furtherance of the scheme. *See United States v. Corey*, *supra*, Slip. op. at 586, n.2, and cases cited therein. Judge Ward repeatedly explained these elements to the jury in a correct fashion. In explaining the required "involvement" of the mails, Judge Ward correctly stated that the proof must show "at least one use of the mails which was for the purpose of furthering or executing the alleged fraud". (Tr. 658). Similarly, with respect to wire fraud, the District Court charged:

"Once again, the use of the wire communication must, in order to satisfy this element, must be for the purpose of furthering the alleged fraud." (Tr. 660).

These instructions were absolutely proper, and clarified any possible confusion which might be claimed to have existed from the Court's earlier summary reference to the essential elements.* *United States v. Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied sub nom. Scardino v. United States*, 425 U.S. 960 (1976).

* There can be no question here that the jury was fully and correctly advised of the nature of the elements concerning use of the mails and interstate telephone. Judge Ward read both Counts One and Two of the indictment (Tr. 645-48) and the applicable statutes, 18 U.S.C. §§ 1341, 1343 (Tr. 649-50). This clear explication of the elements alone suffices to refute Hasenstab's claim of error. *United States v. Reyes-Padron*, 538 F.2d 33, 35 (2d Cir. 1976).

Hasenstab complains further of the trial court's choice of language in other respects. Through an incorrect and tortured parsing of sentences, he alleges error in the use of the words "incidentally" and "incident" (Br. 40). While Hasenstab recognizes that Judge Ward properly instructed the jury that proof that the mails were used "incidentally" to the scheme would be insufficient, the defendant argues that it was error to charge in the same context: "the proof must show that the use of the mails was intended in the sense that it was reasonably foreseeable as an incident that would occur in furtherance of . . . the scheme to defraud." (Tr. 658). Of course, Hasenstab fails to recognize that in plain and common sense the adverb "incidentally" means "by chance", while the noun "incident" means an "occurrence" or "happening." See also, Webster's New Collegiate Dictionary (1977) at 580. The District Court used the words in their proper and readily understandable context. Hasenstab's wish for error here reflects utter disregard for the simple definitions of the language used.

Hasenstab also contends incredibly that the District Court directed a guilty verdict in the instruction that the jury had to find "at least one such mailing under the instructions I have just given you before you may convict on Count I." How this language amounted to a directed verdict simply is unfathomable. In any event, by using the phrase, "before you may convict," the court simply reiterated the requirement for sufficient proof of use of the mails as an element of the mail fraud statute. Judge Ward's reference to "the instructions I have just given you" properly and clearly reminded the jury of the instructions on mail fraud as a whole, so that the element of use of the mails would be cast in terms of the entire charge.

The Court's charge on "ordinary course of business" also was plainly correct. (Tr. 660).^{*} In the face of *Pereira v. United States*, *supra*, Hasenstab recklessly suggests that no authority exists for the proposition that guilt may be premised upon a finding of the defendant's knowledge that use of wire communications would follow in the ordinary course of business. (Brief at 42-3). While *Pereira* refers to use of the mails, not telephones, the defendant also ignores *United States v. Houlihan*, 332 F.2d 8, 13 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964), in which this Court specifically applied the *Pereira* principle to wire fraud prosecutions.

B. "Actions speak louder than words."

Hasenstab somehow equates the use of the adage "actions speak louder than words" in the standard conspiracy charge with an effort on the part of the District Court to give its "opinion of the case".^{**} The phrase has nothing

^{*} The full charge, in context, on this point was:

"I have told you that you do not have to find for this purpose that Mr. Hasenstab himself actually mailed an item to constitute this aspect of the proof. You must find, however, before you may convict the defendant, that if he did not personally participate in the use of the mails, he at least in the sense of the indictment and the statute caused the mails to be used.

"In this sense, one can cause the use of the mails if he either knows that the use of the mails will follow from the working out of the scheme in the ordinary course of business, or if such use of that mailing is reasonably foreseeable to the defendant as part of the evidence covered by the continuation and the elaboration of the fraudulent scheme." (Tr. 658-59).

^{**} With complete indifference to the record in this case, Hasenstab asserts that there was no instruction by the trial judge to the effect that the "jury was not bound by the Judge's comments." (Br. 44) In fact, at the beginning of the court's charge, Judge Ward specifically instructed the jury:

[Footnote continued on following page]

to do with the trial court's opinion, but refers to the circumstantial method of proof which must be relied upon to determine the existence of the criminal agreement necessary to establish guilt of conspiracy. Such an agreement usually must be proved circumstantially, *Glasser v. United States*, 315 U.S. 60, 80 (1942), and the use of the phrase "actions speak louder than words" to describe the nature of the proof has been expressly approved by this Court. *United States v. Cassino*, 467 F.2d 610, 619 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973).

C. "Duty to convict."

In another selective excision from Judge Ward's charge, Hasenstab claims that the trial court directed a guilty verdict by correctly reminding the jury that it need not find the existence of each and every scheme charged in the indictment before it could convict the defendant. In this respect, Judge Ward stated:

"... [I]t is not necessary that the government prove every aspect of the schemes to defraud as they are described in the indictment or the existence of more than one scheme as to any one count, so long as it proves any of the schemes charged in any count to comport with the legal requirements I have already instructed you about. It would still be your duty to convict even if you find that the government had proven only one of the pretenses, representations or concealments of a material fact charged in the indictment and that each of the other essential elements that I have previously described to you has been proven." (Tr. 675-76).

"So too, anything I may have said during the trial or may refer to during the course of these instructions with respect to any matter in evidence or as to any factual matter is not to be taken in lieu of your own recollection." (Tr. 642).

Again, the trial court here did not direct a guilty verdict, but simply and correctly pointed out that if each of the elements of mail or wire fraud were proved beyond a reasonable doubt, the jury need only find the existence of one of the alleged schemes in order to convict. *United States v. AMREP Corp.*, 560 F.2d 539, 546 (2d Cir. 1977). Only by lifting out of context and placing a tortured interpretation upon the phrase "duty to convict" does defendant argue that this language directed a verdict of guilty. Moreover, even under defendant's construction of the phrase, Judge Ward's statement of the jury's legal responsibility to convict was proper. This Court has specifically approved an instruction on the jury's obligation to convict if it finds proof beyond a reasonable doubt. *United States v. Witt*, 215 F.2d 580, 585 (2d Cir.), *cert. denied sub nom. Talanker v. United States*, 348 U.S. 887 (1954).

Finally, Hasenstab ignores the fact that Judge Ward's charge at all points was even-handed and fair to both sides. Thus, defendant predictably does not point out the following portion of the charge delivered by the trial judge at the conclusion of his instructions:

"If you believe that the evidence shows beyond a reasonable doubt that the defendant was guilty of any of the charges made in the indictment, you may find him guilty of the charges which you believe have been proved beyond a reasonable doubt.

"On the other hand, if you believe that the charges or some of them have not been proved beyond a reasonable doubt, the defendant should be acquitted on the charge or charges which you believe have not been proved beyond a reasonable doubt." (Tr. 681).

In sum, it is plain that the District Court in its complete charge simply gave a proper and balanced statement of

the law as it relates to the burden of proof and the obligations of the jury, and by no stretch of the imagination either exhorted the jury to return a guilty verdict nor prejudiced the defendant in any way.

D. The Luncheon.

Not content with mere objections to the District Court's legal instructions, Hasenstab takes issue with a "housekeeping" remark made by Judge Ward to the jury prior to summations. Although Hasenstab's counsel offered no objection at the time, defendant now claims that his opportunity for a "fair deliberation process" was prejudiced by the following:

"You will either be asked to deliberate briefly and then be sent out to lunch—the government will be paying the luncheon checks—or, if we run later, we will be going directly through lunch."
(Tr. 602).

While the jurors obviously were unable to read in print the lower-case "g" in "government", it is difficult to imagine how the trial court's concern for the jurors' gastronomic comfort possibly or even arguably could have risen to the level of prejudice which Hasenstab claims. Indeed, although Hasenstab's counsel had numerous opportunities to call the matter to the court's attention and offer a curative instruction, he remained silent, indicating his own timely view that this innocuous matter was not prejudicial. The court's remarks here do not approach the personal nature of the contact in *United States v. Lubrano*, 529 F.2d 633, 638 (2d Cir. 1975), where a Government agent, a member of the prosecution team, obtained coffee for two jurors during a recess. This Court found no reversible error in *Lubrano* and it should find the present claim simply frivolous in the extreme.

POINT III**The District Court properly admitted evidence of the co-conspirator's misconduct.**

As his final point, Hasenstab argues that Judge Ward erred in admitting evidence of acts of misconduct by the Government's principal witness, co-conspirator George Barney. Defendant's claim that this evidence portrayed Hasenstab as a "bad man" for having associated with Barney is without merit.

During direct examination, Barney testified over objection that in order to prevent his competitor Moore Business Forms from complaining about his receipt of a portion of Moore's long-term contract with Pan American for computer paper, he paid a kickback to the Moore salesman by making checks out to the salesman's brother. (Tr. 336-42). Barney also testified that while he was president of Tabulating Forms, Inc., he made illegal payments to approximately twelve other individuals. Defense counsel made no objection to this latter testimony, but claimed only that it should be brought out on cross-examination rather than on direct. (Tr. 356-60).

All of this testimony was properly elicited from Barney on direct examination. Obviously, Barney's commission of these corrupt acts was damaging to his credibility, a fact which defense counsel recognized when he refused to waive cross-examination on this line. (Tr. 339-40). Accordingly, the Government was permitted to prevent creation of the misleading impression that the Government was attempting to hide these facts from the jury. *United States v. Rothman*, 463 F.2d 8, 490 (2d Cir. 1972); *United States v. Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). Counsel here did not object to the substance of most of the testimony and did not request a

cautionary instruction. Therefore, Hasenstab cannot now complain of any possible prejudice resulting from admission of this proof. *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977), and cases cited therein. See also, *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977); *United States v. Garguilo*, 554 F.2d 59, 63 (2d Cir. 1977); *United States v. Rothman*, *supra*; *United States v. Indiviglio*, 325 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).*

Moreover, the testimony concerning Barney's payoff of the Moore salesman, O'Brien, was proof of an act in furtherance of the conspiracy and this was admissible against Hasenstab. *United States v. AMREP Corp.* *supra*, 560 F.2d at 545; *United States v. Cohen*, 145 F.2d 82 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945). Obviously, it was necessary for Barney to prevent a complaint by Moore Business Forms so that he and Hasenstab could continue their illegal relationship. Indeed, Hasenstab himself was chargeable with Barney's illegal conduct in that regard. See *Pinkerton v. United States*, 328 U.S. 650 (1946); *United States v. Castellana*, 349 F.2d 264 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966).

Hasenstab also complains of error in the admission of proof of his attempts to assist Barney in disguising the kickbacks for tax purposes. Barney testified that Hasenstab first mentioned placing his wife on Barney's payroll. Then he suggested that Barney could deduct the kickbacks as entertainment expenses by using receipts from the Chelsea Restaurant, near JFK Airport, a restaurant frequented by Hasenstab. (Tr. 349-50). Barney completed

* The cases cited by the defendant in support of his contrary argument, *United States v. Karnes*, 531 F.2d 214 (4th Cir. 1975), and *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975), have absolutely nothing to do with this issue.

the receipts himself to substantiate expenses for a tax audit for the years 1973 and 1974. (Tr. 353). Several blank receipts which Barney had kept were admitted into evidence at trial without objection. (GX. 8, 9; Tr. 352). Again, the defendant's failure to have objected on any articulated ground at trial to this evidence precludes assertion of the point on appeal. *United States v. Braunig, supra*; *United States v. Indiviglio, supra*.^{*} Furthermore, even on its merits defendant's claim is without basis. Defendant now complains that this evidence was an attack on his character because it showed his willingness to assist Barney with a tax problem. (Br. at 50). Hasenstab's incomprehensible claim is much beside the point. This testimony was particularly relevant to show Hasenstab's intimate involvement with Barney in the scheme, and obviously was relevant as well on the question of defendant's intent. To the extent that the proof demonstrated Hasenstab's bad character, it did so only because he was actively involved in the fraudulent scheme charged in the indictment.

^{*} At the beginning of the testimony on this point, Hasenstab's counsel objected to "anything further." (Tr. 349). The trial court sustained the objection, "at this time". Government counsel then laid a proper foundation for proof of conversation about the restaurant receipts, and the examination on this topic proceeded without further objection. There was certainly never any objection as to relevance, and the defendant cannot rely on the earlier objection as raising this point. *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Delia A. Gildea, being duly sworn,
deposes and says that she is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 12th day of January, 1978,
she served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Friedman, Friedman, Levy & Bottiglieri
655 Madison Avenue
New York, New York 10021

And deponent further says that she sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Delia A. Gildea

Sworn to before me this

12th day of January, 1978.

Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4520336
Qualified in Richmond City.
Comm. Expires March 30, 1979